IN THE

Supreme Court of the United States

OCTOBER TERM, 1952. 1953

No. 614/16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Bankers Life and Casualty Company, respectfully shows this Court:

I.

SUMMARY STATEMENT.

This petition seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit dismissing a petition for mandamus to vacate a District Court order. (R. 130-131.) Without determining or considering on the merits whether the District Court order was "rightly entered," the Court of Appeals dismissed the petition not as

an exercise of discretion but solely on the legal ground that relief by mandamus was not an "appropriate" remedy. (R. 130.)

The order sought to be vacated was entered in an action brought by petitioner, an Illinois insurance corporation, in the United States District Court for the Southern District of Florida, Miami Division, under the Clayton and Sherman Antitrust Acts, against Zack D. Cravey, Insurance Commissioner of Georgia, J. Edwin Larson, Insurance Commissioner of Florida, one other individual, and a group of commonly owned insurance companies residing and transacting business in the Southern District of Florida. The relief demanded was the recovery of $30,000,000 treble damages resulting from a conspiracy in restraint of interstate commerce entered into by defendants for the purpose of destroying petitioner's insurance business and of raiding its agency forces in Florida, Georgia and elsewhere. (R. 13-40.)

The order was entered on defendant Cravey's motion to dismiss asserting want of jurisdiction of his person and improper venue as to him. The motion was grounded on the facts that Cravey resided in Georgia and that the summons and complaint were served on him not in the Southern but in the Northern District of Florida. (R. 42-49.)

The respondent judge found that the District Court had jurisdiction of the subject matter, and "technically jurisdiction of the person under Rule 4(f) was acquired, but * * * there is no venue insofar as the defendant Zack D. Cravey is concerned." (R. 78.) He ordered a severance as to Cravey and the transfer of the action against him to the Northern District of Georgia, Atlanta Division, pursuant to 28 U. S. C. § 1406(a). (R. 78.) His decision was that even though the uncontroverted facts established that Cravey had co-conspirators residing in the district where the action was brought and had committed overt acts there,

not only in person but also through the agency of his resident co-conspirators, nevertheless he was not found and did not have an agent in the district within the meaning of 15 U. S. C. § 15 (R. 78, 62-77) authorizing suit against a conspirator in any district in which he is found or has an agent.

The uncontroverted facts appear in petitioner's complaint and in affidavits. The complaint alleges: Petitioner is engaged in the interstate life, health and accident, and hospitalization insurance business in 31 states and the District of Columbia. Its assets exceed $40,000,000. In 1951 it collected premiums in excess of $58,000,000 through its more than 4,000 agents and employees. Defendants Cravey and Larson formed a conspiracy in 1949 to use their respective insurance commissioner offices, under the guise of regulation, to destroy petitioner's business in Florida, Georgia and elsewhere and prevent petitioner from being licensed in additional states. The commonly owned insurance companies joined the conspiracy and by concert of action with Cravey and Larson furthered its purposes by overt acts committed in Florida, Georgia and elsewhere, and conducted a secret campaign of bribing employees and agents of defendant Cravey and other public officials. Pursuant to the conspiracy Cravey refused to renew petitioner's Georgia license in 1951. This enabled the commonly owned insurance companies, with the connivance of Cravey and Larson, to lure away and recruit petitioner's agents and employees in the Southern District of Florida and in Georgia. The Supreme Court of Georgia adjudged that Cravey's refusal to renew petitioner's license was without justification. During the period covered by the complaint the conspirators actively furthered the conspiracy within the Southern District of Florida by committing numerous overt acts in the district. (R. 13-40.)

The affidavits opposing the motion state: Defendant

Cravey was at the Delano Hotel, Miami Beach, in the Southern District of Florida, on March 29, 30 and 31, 1950, personally transacting and conducting the unlawful business of the conspiracy by participating in the presentation and submission at an insurance commissioners' meeting of recommendations prepared by defendants Cravey and Larson as members of a committee whose formation they had instigated and to which they had procured their appointment, which recommendations were designed to discredit petitioner and injure its business. Defendant Cravey, in furtherance of the conspiracy, caused the publication in a Jacksonville newspaper, in the Southern District of Florida, on July 21, 1951, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. The false publication was used by the conspirators in the Southern District of Florida to further the purposes of the conspiracy and injure petitioner's business. (R. 62-77.)

Cravey's affidavit in support of the motion stated that he resided in Georgia, did not reside in Florida, his legal conclusions that he did not transact business and was not found and did not have an agent in Florida, and that he was not served with process in the Southern District of Florida but was served while attending a meeting of the National Association of Insurance Commissioners at Panama City, in the Northern District of Florida; that such meetings are held periodically in all of the several states and his presence in Panama City was in connection with the performance of his duties as insurance commissioner, which require his attendance at such meetings. (R. 48-49.)

The Court of Appeals granted petitioner leave to file the petition for mandamus. (R. 110.) The petition summarized the uncontroverted facts in the complaint and opposing affidavits and also alleged the following additional uncontroverted facts: The conspiracy action will involve the testimony of more than 100 witnesses residing in more than

31 states, the taking of whose depositions and testimony, if they must be duplicated in consequence of the order of severance and transfer, would impose an extraordinary burden on the two District Courts as well as on the litigants. The order, if permitted to stand, would defeat the objective of trying interrelated issues in a single action. The resultant multiplicity of actions would give rise to a myriad of legal and practical problems in the progress of one action sectionally in two courts, such, for instance, as priority of trials, possible conflicting rulings by two courts on identical matters, precedence between the two courts in the production of original documents and other evidence, possible conflicting verdicts of two juries on identical issues, possible differences in amounts of verdicts of two juries on identical evidence of damage, and the effect of the verdict first rendered upon the trial of the other section of the same action. (R. 2-12.)

The dismissal of the petition for mandamus was on motion of the respondent judge "as the nominal defendant" and Cravey as the "party at interest" asserting that the petition failed "to show any reason in law wherein the relief prayed for is appropriate." (R. 110-111.)

A petition for rehearing (R. 132-135) was denied by the Court of Appeals on December 12, 1952. (R. 136.)

The respondent judge stayed the severance and transfer pending the mandamus proceeding in the Court of Appeals (R. 80-81), and further stayed it pending this petition for certiorari. (Exhibits A and B attached hereto.)

II.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered November 6, 1952. (R. 130-131.) The petition for

rehearing filed November 26, 1952 (R. 132-135) was denied on December 12, 1952. (R. 136.)

III.

QUESTIONS PRESENTED.

1. Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?

2. Where venue is properly laid in a district in which a non-resident conspirator is "found" and has agents within the meaning of 15 U. S. C. § 15, is mandamus appropriate to vacate the order of severance and transfer as being in excess of the power of transfer conferred by 28 U. S. C. § 1406(a)?

3. Is a non-resident conspirator "found" for venue purposes within the meaning of 15 U. S. C. § 15 when, although served with process in another district in the same state, venue is laid in a district where he has, in person when physically present and at other times through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?

4. Are the resident co-conspirators of a non-resident conspirator his agents for venue purposes within the meaning of 15 U. S. C. § 15 when venue is laid in a district where he has, through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Court of Appeals decided a federal question—that mandamus is not an appropriate remedy—in a way probably in conflict with applicable decisions of this Court.[1]

2. The question is an important one of federal law which should be settled by this Court to resolve the doubts, uncertainties and confusion resulting from the equal division affirmances by this Court on October 27, 1952 of two conflicting Courts of Appeals decisions, one holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), the other holding that it is not.[2]

3. The decision of the Court of Appeals that mandamus is not an appropriate remedy is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *C-O-Two Fire Equipment Co.* v. *Barnes*, 194 F. 2d 410 (1952), although in agreement with the decision of the Court of Appeals for the Ninth Circuit in *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457 (1950) and the decision of the Court of Appeals for the Third Circuit in *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (1951).

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1. *Ex Parte Schollenberger*, 96 U. S. 369 (1878); *In re Simons*, 247 U. S. 231 (1918); *In re Peterson*, 253 U. S. 300 (1920); *In re Hohorst*, 150 U. S. 653 (1893); *In re Skinner & Eddy Corp.*, 265 U. S. 86 (1924); *Ex Parte Harley-Davidson Motor Co.*, 259 U. S. 414 (1922); *Los Angeles Brush Co.* v. *James*, 272 U. S. 701 (1927); *McCullough* v. *Cosgrave*, 309 U. S. 635 (1940); *Ex Parte Republic of Peru*, 318 U. S. 578 (1943).

2. *Cardox Corp.* v. *C-O-Two Fire Equipment Co.*, 344 U. S. 861, affirming the decision of the Court of Appeals for the Seventh Circuit in *C-O-Two Fire Equipment Co.* v. *Barnes* 194 F. 2d 410 (1952); *Gulf Research & Development Co.* v. *Leahy*, 344 U. S. 861, affirming the decision of the Court of Appeals for the Third Circuit in *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (1951).

4. By deciding as a matter of law that mandamus was not appropriate to expunge the order of severance and transfer the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure sanctioned is the splitting of a single action into two sections in different districts thus compelling multiplicity of trials, duplication of the testimony of more than one hundred witnesses residing in more than thirty-one states, and appeals from two judgments, before plaintiff can enforce its right to a single trial against all defendants in a proper forum.

5. The Court of Appeals departed from the accepted and usual course of judicial proceedings to such an extent as to call for the exercise of this Court's power of supervision when, notwithstanding the extraordinary hardships and insuperable procedural difficulties consequent upon the void order of severance and transfer, it decided "that no fact or reason is stated showing" that mandamus is appropriate to vacate the order in aid of its appellate jurisdiction.

6. The venue questions presented have not been passed on by this Court and are so important in the administration of the antitrust laws that this Court should settle them notwithstanding the refusal of the Court of Appeals to consider them on the merits.

V.

PRAYER FOR WRIT.

A certified copy of the entire record of the proceeding in the Court of Appeals for the Fifth Circuit is herewith exhibited and made a part hereof, in compliance with Rule 38 of this Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari may issue out of and under the Seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send up to this Court a full and complete transcript of the record and proceedings in the proceeding numbered and entitled on its Docket 14222, *In Re: Bankers Life and Casualty Company, Praying for a Writ of Mandamus*, to the end that said proceeding may be reviewed and the manifest errors of the Honorable Court of Appeals be revised and corrected, as provided by law; that upon the hearing by this Honorable Court the judgment of dismissal be vacated and set aside and that petitioner may have such other and further relief in the premises as may seem just and proper.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals rendered November 6, 1952, is reported in 199 F. 2d 593 (1952). A petition for rehearing (R. 132-135) was denied December 12, 1952. (R. 136.)

II.

JURISDICTION.

Jurisdiction to review this cause by Writ of Certiorari is conferred on this Court by 28 U. S. C. § 1254(1).

III.

STATEMENT.

The nature of the case and the decision of the Court of Appeals for the Fifth Circuit are set forth in the foregoing petition (pp. 1-5) which, in the interest of brevity, is adopted as a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus.

V.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING PETITION.

Reason 1.

The Court of Appeals decided a federal question—that mandamus is not an appropriate remedy—in a way probably in conflict with applicable decisions of this Court.

Power to issue the writ of mandamus is conferred on the Courts of Appeals and the Supreme Court alike by 28 U. S. C. § 1651(a). Mandamus is an extraordinary legal remedy although in the main controlled by equitable principles.[1] The major consideration in determining its appropriate use is the absence of any other adequate remedy. Accordingly, in the case of *In re Simons*, 247 U. S. 231, 239-240 (1918), Mr. Justice Holmes, speaking for a unanimous court, said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case."

In the later case of *In re Peterson*, 253 U. S. 300 (1920), this Court, speaking through Mr. Justice Brandeis, rejected the contention that the writ could not issue from this Court because the party, if he felt himself denied a jury trial, could protect himself by timely exceptions and ob-

1. Willis Constitutional Law of the United States (1936), pp. 92-93, citing *Marbury* v. *Madison*, 5 U. S. 137 (1803), *United States* v. *Allen*, 192 U. S. 543 (1904).

tain review and correction of the error in the Court of Appeals. Paraphrasing the *Simons* case, the Court held that the "matter should be dealt with now."

It is submitted that petitioner's need is far more urgent than the needs shown to this Court in the *Simons* and *Peterson* cases. Petitioner has no other adequate remedy as there can be no appeal at this stage of the proceedings,[2] and the order, unless dealt with now will result in irreparable damage and delay as the consequence of a judicial act.

The ordinary remedy of appeal after judgment would be wholly inadequate. This is so because the splitting of the action into two sections in different districts would result in two appealable judgments rather than the usual one. The reversal of either would not suffice to enforce petitioner's right to a single trial against all defendants in a proper forum. The right could be enforced only by the reversal of both judgments.

Under these circumstances the decision of the Court of Appeals is in conflict with the *Simons* and *Peterson* cases, as well as other decisions of this Court.[3]

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2. 28 U. S. C. §§ 1291-1292.

3. *Ex Parte Schollenberger*, 96 U. S. 369 (1878), where the writ was issued directing a Circuit Court to hear and determine certain suits in which it had refused to exercise jurisdiction after erroneously adjudicating that the defendants had not been "found" in the district; *In re Hohorst*, 150 U. S. 653 (1893), where this Court stated: "* * * and the order of that court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the Circuit Court to take jurisdiction of the suit as against the corporation."; *In re Skinner & Eddy Corp.*, 265 U. S. 86 (1924), where this Court issued its writ to the Court of Claims directing it to reinstate its order dismissing a suit. This Court said: "It would be a useless waste of time and effort to enforce a trial in the Court of Claims, if we were, upon appeal, to find that the petitioner was unjustly deprived of his

Reason 2.

The question is an important one of federal law which should be settled by this Court to resolve the doubts, uncertainties and confusion resulting from the equal division affirmances by this Court on October 27, 1952 of two conflicting Courts of Appeals decisions, one holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), the other holding that it is not.

The equal division affirmances by this Court on October 27, 1952 in *Cardox Corp.* v. *C-O-Two Fire Equipment Co.*, 344 U. S. 861, and *Gulf Research & Development Co.* v. *Leahy*, 344 U. S. 861, affirming *C-O-Two Fire Equipment Co.* v. *Barnes* (C. A. 7), 194 F. 2d 410 (1952), holding that mandamus is an appropriate remedy to vacate an order misapplying 28 U. S. C. § 1406(a), and *Gulf Research and Development Co.* v. *Leahy* (C. A. 3), 193 F. 2d 302 (1951), holding that it is not, have left the lower courts, litigants and the bar in the dilemma of choosing between equally authoritative but diametrically opposed determinations of federal procedure involving the question of mandamus being an appropriate remedy to correct misconceptions of the authority granted by 28 U. S. C. § 1406(a). As a result, the lower courts are confronted with a situation so critical that, in the words of *In re Peterson*, the "matter should be dealt with now."

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substantial right to dismiss his petition."; *Ex Parte Harley-Davidson Motor Co.*, 259 U. S. 414 (1922), where this Court issued a writ compelling the Court of Appeals to vacate an order of dismissal and to decide the appeal presented, jurisdiction having been acquired by that court. See also *Los Angeles Brush Co.* v. *James*, 272 U. S. 701 (1927); *Ex Parte Republic of Peru*, 318 U. S. 578 (1943); *McCullough* v. *Cosgrave*, 309 U. S. 635 (1940).

Reason 3.

The decision of the Court of Appeals that mandamus is not an appropriate remedy is in conflict with the decision of the Court of Appeals for the Seventh Circuit in C-O-Two Fire Equipment Co. v. Barnes, 194 F. 2d 410 (1952), although in agreement with the decision of the Court of Appeals for the Ninth Circuit in Gulf Research & Development Co. v. Harrison, 185 F. 2d 457 (1950), and the decision of the Court of Appeals for the Third Circuit in Gulf Research & Development Co. v. Leahy, 193 F. 2d 302 (1951).

In *C-O-Two Fire Equipment Co. v. Barnes* (C. A. 7), 194 F. 2d 410 (1952), the court held that it had the power to issue the writ of mandamus and that it was an appropriate case for the exercise of such power. In *Gulf Research & Development Co. v. Harrison* (C. A. 9), 185 F. 2d 457 (1950), and *Gulf Research & Development Co. v. Leahy* (C. A. 3), 193 F. 2d 302 (1951), the respective courts held that mandamus was not an appropriate remedy.

Further evidence of the confusion and uncertainty caused by this controversial issue is the fact that both the Third and Fifth Circuits[4] have held that mandamus is an appropriate remedy to examine the action of district judges purportedly authorized by § 1404(a), whereas the same circuits have refused this remedy as a solution for the same problem arising under § 1406(a), but the Seventh Circuit in arriving at its decision in *C-O-Two Fire Equipment Co. v. Barnes*, 194 F. 2d 410 (1952), relied upon and cited as authority only § 1404(a) cases. In *Gulf Research and*

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4. *Gulf Research & Development Co. v. Leahy, supra; Atlantic Coast Line R. Co. v. Davis* (C. A. 5), 185 F. 2d 766 (1950).

Development Co. v. Leahy, *supra*, the court, in referring to the § 1404(a) cases "conceded that these cases conflict in principle with our present decision."

Undeniably, the conflict of the decision in the case at bar with that of the Seventh Circuit in *C-O-Two Fire Equipment Co. v. Barnes*, on the precise point involved, calls for the issuance of a writ of certiorari. In addition, the admitted conflict in principle between the treatment of § 1406(a) and § 1404(a) cases inexorably calls for this Court to decide what is the uniform federal procedure.

Reason 4.

By deciding as a matter of law that mandamus was not appropriate to expunge the order of severance and transfer the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure sanctioned is the splitting of a single action into two sections in different districts thus compelling multiplicity of trials, duplication of the testimony of more than one hundred witnesses residing in more than thirty-one states, and appeals from two judgments, before plaintiff can enforce its right to a single trial against all defendants in a proper forum.

The Court of Appeals said "that no fact or reason is stated showing that relief by mandamus is an appropriate remedy."

At the outset it is seen that the District Court had jurisdiction of the subject matter and of the person of Cravey. The respondent judge refused to exercise and renounced this jurisdiction by ordering the severance and the transfer to the other district of the action against Cravey, who was one of seven defendants. Obviously, this

will impose undue burdens on the courts and will cause many practical problems resulting in great expense to the litigants.

It is believed that never before has there been an order so extraordinary that unless vacated by mandamus appeals from two judgments would be required for its reversal. To deny relief pending one trial, one judgment and one appeal would be bad enough, but it would be unconscionable to say that petitioner could have no relief pending two trials, two judgments and two appeals, all for the single purpose of reversing one order.

It is apparent that if the Florida section of the action should go to judgment first and the order of severance and transfer should be reversed on appeal, there would arise immediately the questions whether defendant Cravey was a party to the appeal and whether the reversal was binding either on him or on the District Court in the Georgia section of the action. It also is apparent that if, during the pendency of such appeal, the Georgia section of the action should go to judgment, the latter would become final and binding unless also appealed.

These illustrations are but suggestive of the countless possible and probable extraordinary procedural difficulties, complications and hardships which almost inevitably would require appeals from and reversals of both judgments before petitioner could enforce its right to a single trial against all defendants in a proper forum.

But they are not all. Imagine, if you will, the duplication in filing proofs of service of notices to take depositions in more than 31 districts as predicates for the issuance of subpoenas and subpoenas *duces tecum* pursuant to Rule 45(d)(1), only to have the judge in the Georgia section of the action enter orders pursuant to Rule 30(b) that a deposition be not taken, or that it be taken at some other

place, or that certain matters shall not be inquired into, or that the scope of the examination be limited, or that no one shall be present except the parties or their counsel, while at the same time the judge in the Florida section may be entering orders regulating the identical matters. It is even possible that the two trial judges might reach different results in such orders.

It is extremely doubtful that the additional expenses thus imposed on petitioner could be recovered, since such damages would be the consequence of a judicial act.

The order, if permitted to stand, unquestionably will defeat the objective of trying interrlated issues in a single action. The resulting multiplicity of actions will give rise to a myriad of additional legal and practical problems in the progress of the one action proceeding sectionally in two courts. For instance, which section will be earliest brought to trial; what if rulings by the two courts on identical matters conflict; which of the two courts shall have precedence in the production of original documents and other evidence; what will be the effect of possible conflicting verdicts of the two juries on identical issues; what will be the effect of possible difference in amounts of verdicts on identical evidence of damage; and what will be the effect of the verdict first rendered on the trial of the other section of the same action?

We respectfully submit that both the statute and the cases preclude such an extraordinary departure from the normal course of litigation. As was said in a similar situation, "To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration."[5]

5. *Ferguson* v. *Ford Motor Co.* (D. C. N. Y.), 77 F. Supp. 425, 433 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2), 182 F. 2d 329 (1950), cert. den. 340 U. S. 851.

Reason 5.

The Court of Appeals departed from the accepted and usual course of judicial proceedings to such an extent as to call for the exercise of this Court's power of supervision when, notwithstanding the extraordinary hardships and irreparable procedural difficulties consequent upon the void order of severance and transfer, it decided "that no fact or reason is stated showing" that mandamus is appropriate to vacate the order in aid of its appellate jurisdiction.

The practice of this Court in recent years in refusing to grant petitions for mandamus addressed to it, but without prejudice to a petition in the proper court of appeals, has by implication indicated the desire of this Court to have these matters properly disposed of by those courts.[6] Therefore, the refusal of the Court of Appeals in this case to hear the petition on its merits because the remedy is not appropriate is a departure from the course of proceedings on mandamus petitions charted by this Court,[7] especially since this is an instance where this Court would otherwise have considered the petition on its merits had it been presented.[8]

It is indisputable that mandamus lies against any officer, executive, judicial, or non-judicial who acts beyond his legal powers. *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908).[9]

---

6. *Ex Parte Apex Electric Mfg. Co.*, 274 U. S. 725 (1927); *Ex Parte Daugherty*, 282 U. S. 809 (1931); *Ex Parte United States*, 287 U. S. 241 (1932).

7. *Ex Parte United States*, 287 U. S. 241 (1932), at pp. 248-249.

8. *Ex Parte Schollenberger*, 96 U. S. 369 (1878).

9. *In re United States*, 263 U. S. 389 (1923); cf. *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929).

In order to determine whether mandamus was appropriate, the Court of Appeals should have ascertained whether the respondent judge acted within the authority granted by 28 U. S. C. § 1406(a).[10] This statute limits the power to transfer to "a case laying venue in the wrong division or district." If, as petitioner contends, venue was properly laid in the Southern District of Florida, the respondent judge was without power to order the severance and transfer. Hence the Court of Appeals should have considered the venue question on the merits. Only then could it have determined whether mandamus was an appropriate remedy.

Examination of the merits by the Court of Appeals would have disclosed that venue was properly laid in the Southern District of Florida. The applicable statutory test of venue is whether Cravey was found in the district or had an agent there.[11] Cravey was "found" through his co-conspirators residing and transacting the illegal business of the conspiracy in the District, not only in their own behalf but also as his agents and on his behalf. He was likewise "found" because he came into the District for the purpose and with the intent of personally transacting and furthering the illegal business of the conspiracy, and while there committed overt acts in conjunction with one or more of his co-conspirators. In addition, he knowingly and wilfully fostered and prosecuted the illegal purposes and business of the conspiracy by causing the publication

10. § 1406. *Cure or waiver of defects.* (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

11. 15 U. S. C. § 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent * * *."

in a newspaper in the District of the false statement that petitioner's licenses in Florida and Iowa had been revoked. This false statement was used in the District by the co-conspirators to damage and destroy petitioner's business and to aid them in pirating petitioner's agency force.

As was held in *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454 (1948), "found" in the venue sense does not necessarily mean physical presence, and, as there indicated, it is immaterial that when process was served on Cravey he had left the Southern District of Florida.

The doctrine that "constructive presence" results from acts of co-conspirators has long been recognized by this Court.[12]

Other statutes requiring "presence" have been comparably construed. In *O'Malley* v. *United States* (C. A. 8), 128 F. 2d 676,[13] the statute in question was formerly 28 U. S. C. § 385, now 18 U. S. C. § 401, providing punishment for contempt in the presence of the court or so near thereto as to obstruct the administration of justice. The Court there held that conspirators were partners and each was the agent of the others, so that their constructive presence in court through their agents subjected them to punishment for the acts committed by the agents.

In the antitrust case of *Ferguson* v. *Ford Motor Co.* (D. C. N. Y.), 77 F. Supp. 425 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2), 182 F. 2d 329 (1950), it was held that for the purpose of laying venue in New York against Henry Ford II, a resident of Michigan, patent infringements in New York

12. *Hyde* v. *United States*, 225 U. S. 347 (1912); *Grayson* v. *United States* (C. A. 6), 272 F. 553, 557 (1921); *Moran* v. *United States* (C. A. 6), 264 F. 768, 770 (1920); *Morris* v. *United States* (C. A. 8), 7 F. 2d 785, 789 (1925).

13. Reversed on other grounds *Pendergast* v. *United States*, 317 U. S. 412 (1943).

by his co-conspirators were his acts there, and that since his co-conspirators had a regular place of business in New York, it was his regular and established place of business.

Unquestionably, each conspirator is the agent of the rest in furtherance of the common design.[14] This is the principle which makes proof of the acts and declarations of each conspirator admissible against the others.[15] This basic concept underlies the decisions applying the substantive principle that a conspiracy is a partnership and each conspirator an agent of the others.[16]

The record before the Court of Appeals, presented with this petition, clearly disclosed that venue was proper because defendant Cravey was "found" and had agents in the District where the suit was brought.

Reason 6.

The venue questions presented have not been passed on by this Court and are so important in the administration of the antitrust laws that this Court should settle them notwithstanding the refusal of the Court of Appeals to consider them on the merits.

Civil actions growing out of conspiracies in restraint of interstate commerce dominate the field of antitrust litigation. Since this Court has not passed upon the precise venue questions raised in this petition for certiorari, we

14. *Merrill* v. *United States* (C. A. 5), 40 F. 2d 315, 316 (1930); *Van Riper* v. *United States* (C. A. 2), 13 F. 2d 961, 967 (1926); *Sidney Morris & Co.* v. *National Association of Stationers* (C. A. 7), 40 F. 2d 620, 624 (1930).

15. *United States* v. *Cole*, 5 McLean 513, Fed. Case No. 14832 (1852).

16. *United States* v. *Gooding*, 25 U. S. 460, 469 (1827); *United States* v. *Kissel*, 218 U. S. 601, 608 (1910); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253 (1940); *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946).

respectfully submit that the prevalent uncertainties should be resolved to obtain orderly procedure in antitrust litigation. This is particularly true in antitrust conspiracy actions which inherently are intricate, complex and lengthy. The crisis in judicial administration brought about by overburdened dockets and overtaxed courts is a further compelling reason for this Court's consideration of the problems raised herein.

All of which is respectfully submitted.

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MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,
Attorneys for Petitioner.

EXHIBIT A.

JE/f11 11-11-62

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Florida,
Miami Division.

Bankers Life and Casualty Company, an Illinois Insurance Corporation,
Plaintiff,
vs.
Zack D. Cravey, *et al*,
Defendants.
} Civil Action No. 4357-M-Civ.

ORDER.

IT IS ORDERED that the severance and transfer heretofore ordered herein as to the defendant Zack D. Cravey, and all further proceedings herein, be suspended and stayed until the court shall have heard and disposed of plaintiff's motion to suspend or stay such severance and transfer, and all other proceedings herein, pending the submission by plaintiff to the United States Supreme Court and the final disposition by that court of a petition for certiorari to the United States Court of Appeals for the Fifth Circuit, seeking a review of that court's action in dismissing the plaintiff's petition for mandamus filed in that court.

DONE AND ORDERED at Miami, Florida, this 12th day of November, 1952.

JOHN W. HOLLAND,
Chief Judge.

ATTEST A TRUE COPY.
JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By EARLE F. SPRIGG,
Deputy Clerk. (SEAL)

EXHIBIT B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Florida,
Miami Division.

Bankers Life and Casualty Company, an Illinois insurance corporation,
Plaintiff,
vs.
Zack D. Cravey, *et al.*,
Defendants.

Civil Action
No. 4307-M-Civ.

STAY ORDER.

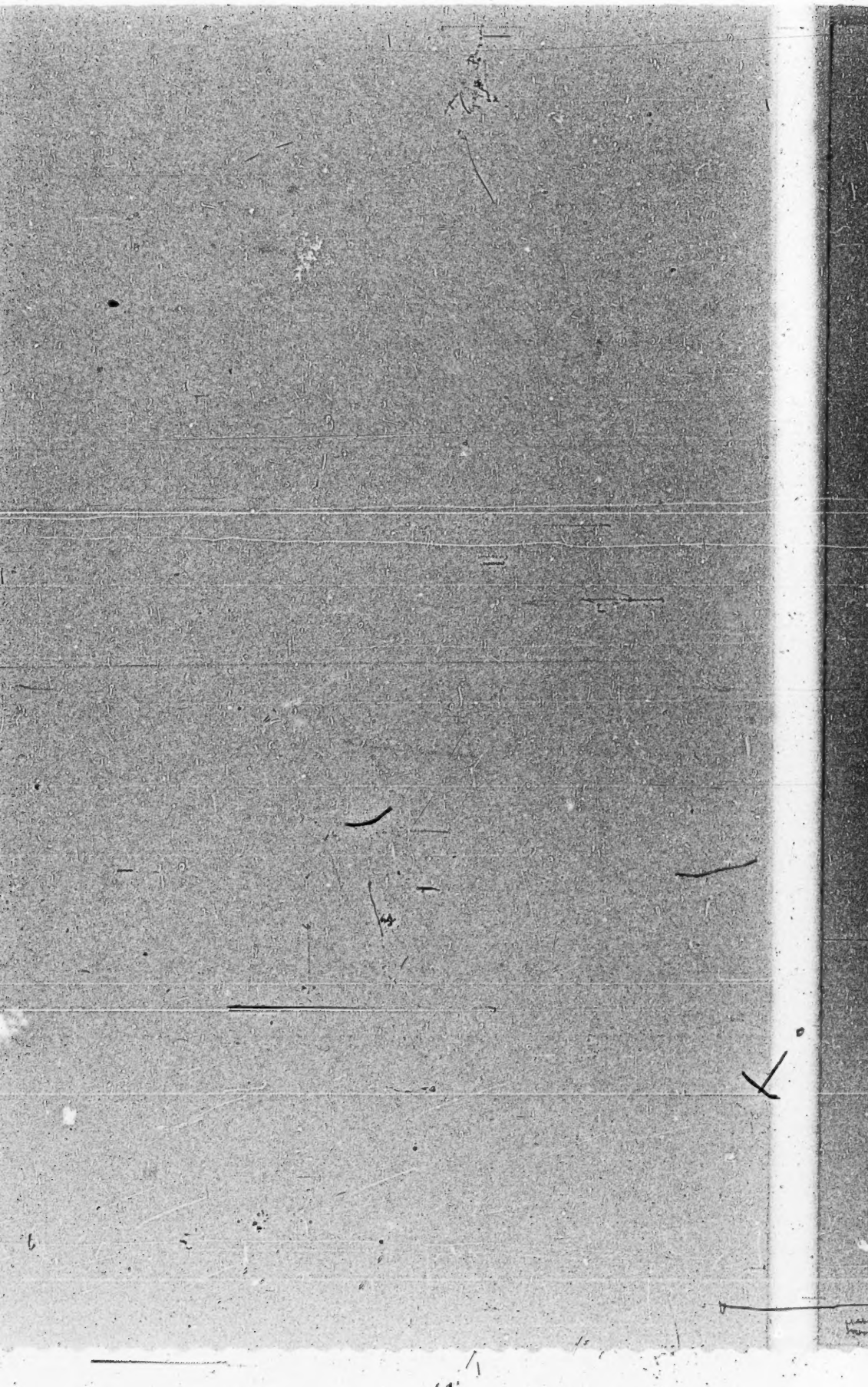
On motion of plaintiff, and after due notice, it is

ORDERED that the severance and transfer heretofore ordered herein as to the defendant, Zack D. Cravey, and all further proceedings herein, be suspended and stayed pending the submission by plaintiff to the Supreme Court of the United States and the final disposition by that Court of a petition for certiorari seeking to review the dismissal by the United States Court of Appeals for the Fifth Circuit of the petition for mandamus wherein plaintiff sought to require the vacating and setting aside of the order of transfer and severance entered herein by this Court and also pending the final disposition by the Court of Appeals of the petition for mandamus in the event of a favorable ruling by the Supreme Court on the petition for certiorari.

DONE and ORDERED at Miami, Florida, this 16th day of January, 1953.

JOHN W. HOLLAND,
Chief Judge.

ATTEST A TRUE COPY.
JULIAN A. BLAKE,
Clerk, U. S. District Court,
Southern District of Florida,
By EARLE F. STRIGG,
Deputy Clerk. (SEAL)



IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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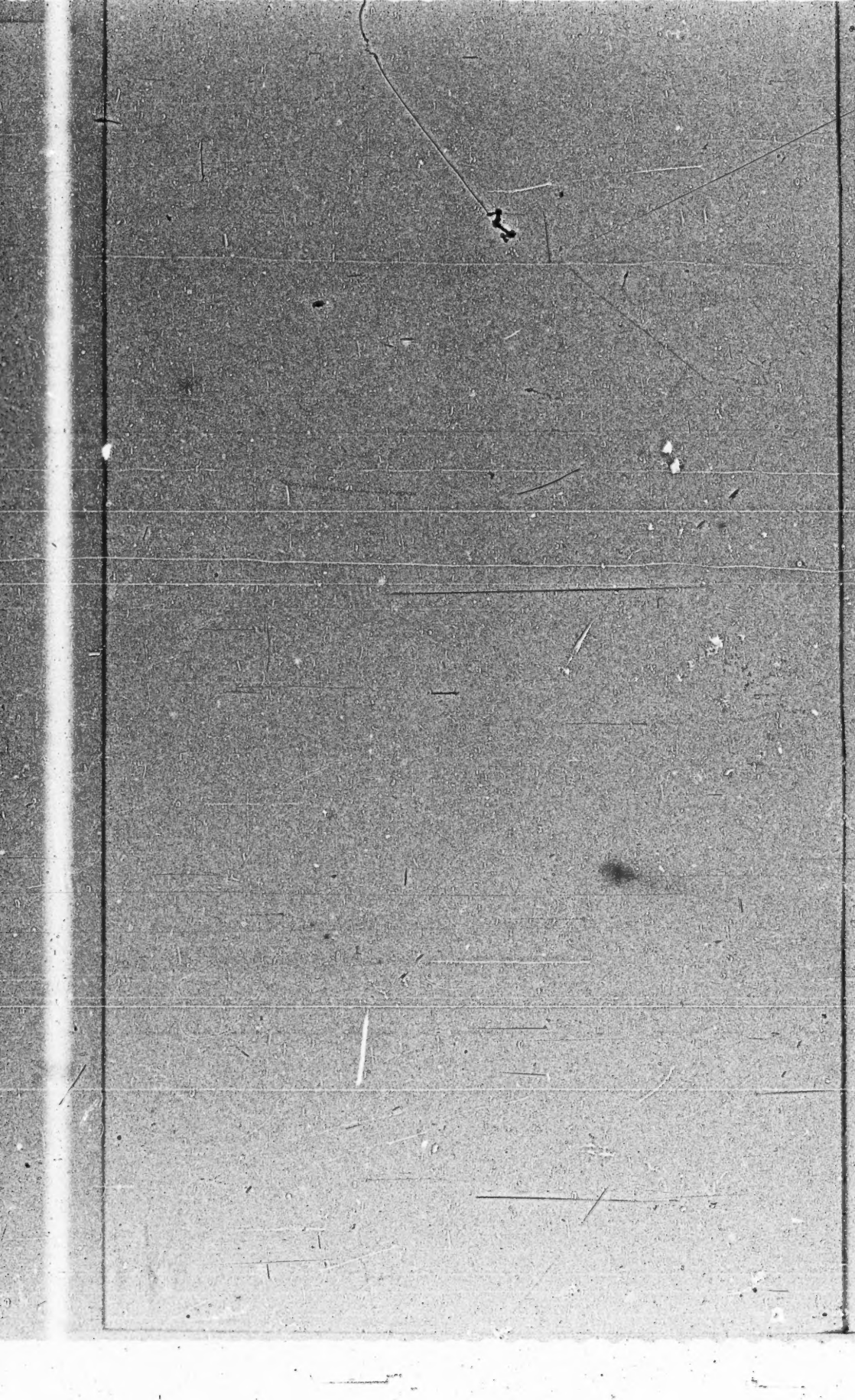

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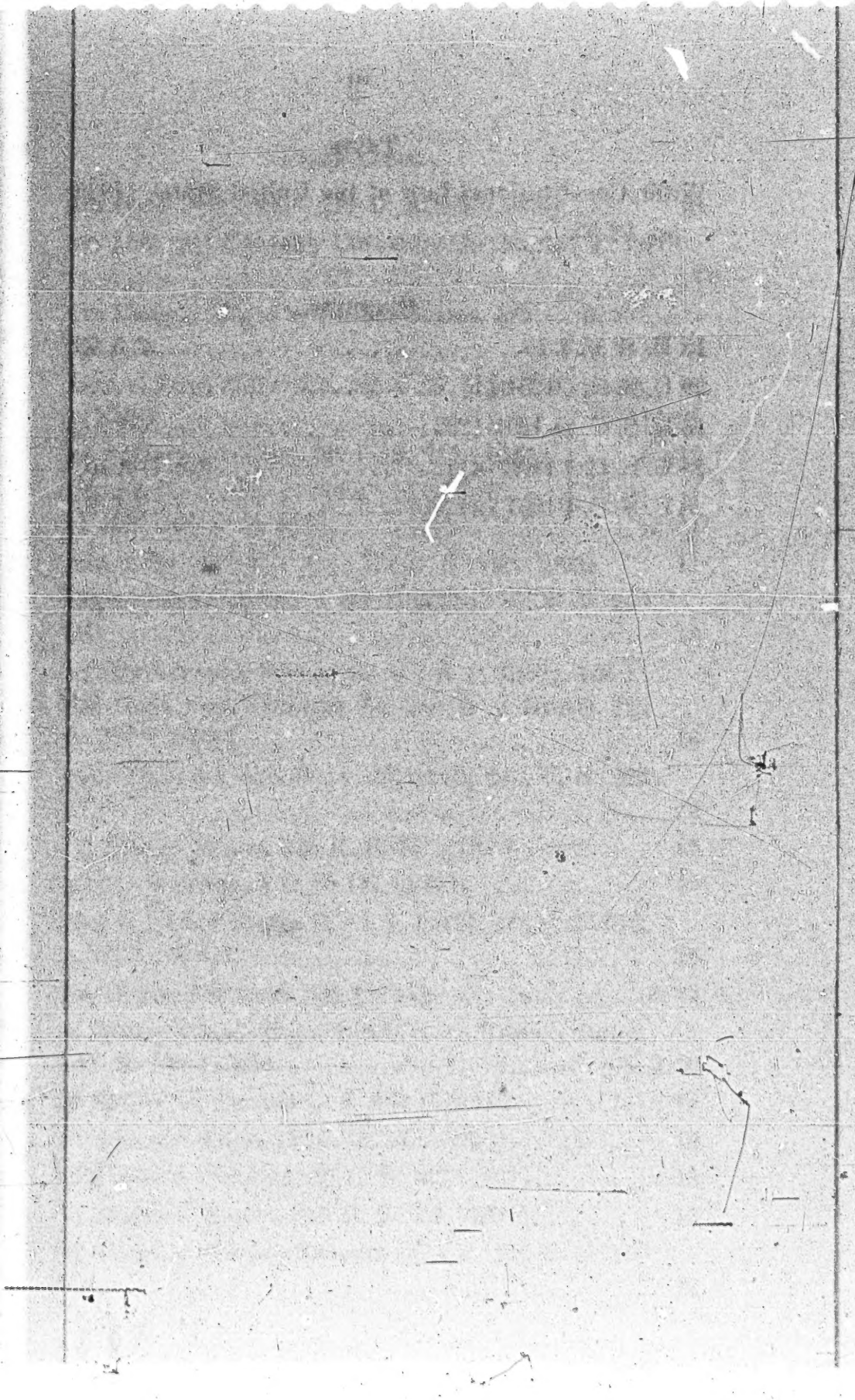

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 614.

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

THE HONORABLE JOHN W. HOLLAND, AS CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND ZACK D. CRAVEY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit (R. 130) is reported at 199 F. 2d 593 *sub nom. In Re Bankers Life and Casualty Company.* The order of the District Court for the Southern District of Florida (R. 78) is unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on November 6, 1952 (R. 130). A

petition for rehearing was denied on December 12, 1952 (R. 136). The petition for writ of certiorari was filed in this Court on February 12, 1953. It was granted by an order of this Court entered April 13, 1953, which limited review to question 1 presented by the petition for the writ (345 U. S. 936). Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The statutes involved are:

15, U. S. C.

"§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is *found or has an agent*, ..." (Italics supplied.)

28, U. S. C.

"§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. (Italics supplied.)

. . . . . ."

"§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

. . . . . ."

STATEMENT OF THE CASE.

The instant proceeding arises out of an action under the Clayton and Sherman Anti-Trust Acts brought by petitioner on April 24, 1952, in the Southern District of Florida, Miami Division. Petitioner is engaged in the interstate life, health and accident, and hospitalization insurance in 31 States and the District of Columbia. Its assets exceed $40,000,000. In 1951 it collected premiums in excess of $58,000,000 through its more than 4,000 agents and employees. Named as defendants, were Zack D. Cravey, Insurance Commissioner of the State of Georgia; J. Edwin Larson, Insurance Commissioner of the State of Florida; one other individual; and a group of commonly owned insurance companies residing and transacting business in the Southern District of Florida. Relief demanded was the recovery of $30,000,000 treble damages resulting from a conspiracy in restraint of interstate commerce entered into by defendants for the purpose of destroying petitioner's insurance business and of raiding its agency forces in Florida, Georgia and elsewhere. (R. 13-40.)

After service of summons on defendant, Zack D. Cravey, he moved to dismiss the suit as to himself asserting want of jurisdiction of his person and improper venue as to him. As grounds for his motion, Cravey relied on the facts that he was a resident of Georgia and that the summons and complaint were served on him not in the Southern District, but in the Northern District of Florida. (R. 42-49.) His affidavit in support of the motion denied residence in Florida and concluded that he did not transact business, nor was he found, nor did he have an agent in Florida.

In opposition to this motion, petitioner relied on the following uncontroverted facts contained in its complaint and counteraffidavits: Defendants Cravey and Larson

formed a conspiracy in 1949 to use their respective offices, under the guise of insurance regulation, to destroy petitioner's business in Florida, Georgia and elsewhere, and prevent petitioner from being licensed in additional States. The commonly owned insurance companies joined the conspiracy and by concert of action with Cravey and Larson, furthered its purposes by overt acts committed in Florida, Georgia and elsewhere. They conducted a secret campaign of bribing employees and agents of defendant Cravey and other public officials to accomplish the purpose of the conspiracy. Pursuant to the conspiracy Cravey refused to renew petitioner's Georgia license in 1951. This enabled the commonly owned insurance companies, with the connivance and active aid of Cravey and Larson, to lure away and recruit petitioner's agents and employees in the Southern District of Florida and in Georgia. The Supreme Court of Georgia adjudged that Cravey's refusal to renew petitioner's license was without justification. During the period covered by the complaint, the conspirators actively furthered the conspiracy within the Southern District of Florida by committing numerous overt acts in that district. (R. 13-40.)

Defendant Cravey was at the Delano Hotel, Miami Beach, in the Southern District of Florida, on March 29, 30, and 31, 1950, personally transacting and conducting the unlawful business of the conspiracy. This was done by participating in the presentation and submission at an insurance commissioners' meeting of recommendations prepared by himself and defendant Larson as members of a committee whose formation they had instigated and to which they had procured their appointment. These recommendations, prepared as alleged in paragraph 15 of the complaint (R. 21), were designed to discredit petitioner and injure its business. Defendant Cravey, in furtherance of the conspiracy,

caused the publication in a Jacksonville newspaper, in the Southern District of Florida, on July 21, 1951, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. Clippings of the false publication were used by the conspirators in the Southern District of Florida to further the purposes of the conspiracy and injure petitioner's business. (R. 62-77.)

Judge Holland, Chief Judge of the District Court for the Southern District of Florida, found that the District Court had jurisdiction of the subject matter, and "technically jurisdiction of the person under Rule 4(f) was acquired, but * * * there is no venue insofar as the defendant Zack D. Cravey is concerned." (R. 78.) He ordered a severance as to Cravey and the transfer of the action against him to the Northern District of Georgia, Atlanta Division, pursuant to 28 U. S. C. § 1406(a). (R. 78.) Even though the uncontroverted facts established that Cravey had co-conspirators residing in the district where the action was brought and had committed overt acts there, not only in person, but also through the agency of his resident co-conspirators, nevertheless, Judge Holland decided that Cravey was not found and did not have an agent in the district within the meaning of 15 U. S. C. § 15. (R. 78, 62-77.)

A motion for leave to file the petition for writ of mandamus was allowed by the Court of Appeals on August 22, 1952. (R. 111.) On November 6, 1952, that Court granted a motion to dismiss the petition, and in its opinion said:

> "* * * no fact or reason is stated showing that the relief by mandamus is an appropriate remedy."

On December 12, 1952, the Court of Appeals denied a petition for rehearing, and on April 13, 1953, this Court granted the petition for certiorari limited to question 1.

QUESTION PRESENTED.

Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in deciding that mandamus was not the appropriate remedy under the special circumstances here obtaining, in failing to issue the writ, and in dismissing the petition for mandamus.

SUMMARY OF ARGUMENT.

I.

Recourse to the extraordinary writs may be had to correct an order made in excess of power conferred. 28 U. S. C. 1651(a); *DeBeers Consol. Mines v. United States*, 325 U. S. 212 (1945). The order of severance and transfer was entered pursuant to 28 U. S. C. § 1406(a) (R. 78), which grants power to transfer a cause *only* when venue is improperly laid. When venue is proper, power to transfer under that section does not exist.

Cravey was caught within the territorial limits of the State and duly served with process pursuant to Rule 4(f) and the District Court thus acquired jurisdiction over him. Since Cravey was a member of a conspiracy whose other members were residing and carrying on the illegal business of the conspiracy in the Southern District of Florida, he had agents there and was also "found" within the meaning of 15 U. S. C. § 15.

Petitioner's position is that a conspiracy is a partnership and that co-conspirators are each other's agents. The presence of co-conspirators transacting the illegal business of a conspiracy within a district at the time suit is commenced, is, then, sufficient to satisfy the requirement of 15 U. S. C. § 15 that the defendant have an agent within the district.

The alternative statutory requirement that a defendant be "found" is also satisfied by the presence within a district of such agents transacting the illegal business of the conspiracy.

In addition, the facts that Cravey had been physically present in the district, that he committed acts in further-

ance of the conspiracy therein, and, subsequent to his departure, that he caused overt acts to be committed in that District, meet the requirement that he be "found" under the doctrine of constructive presence.

When the requirements of the venue statute were thus met, the respondent judge had no authority to enter the order of transfer. To remedy this usurpation of power, mandamus will lie.

II.

Where there is no other adequate remedy, judicial inconvenience and hardship to the litigant have traditionally occasioned the use of the extraordinary writs. Mandamus is an appropriate remedy to prevent the needless expense, hardship, and judicial inconvenience which will result if the trial court's order of severance and transfer is permitted to stand. There is no fair or effective relief available to plaintiff by appeal. This is demonstrated by the extraordinary problems facing the litigants and the courts in the trial and appeals of two sections of a complex and lengthy case, before the Court of Appeals can determine that the order was beyond the power of the District Court. Thus, the issuance of a writ of mandamus is clearly dictated.

III.

The individual tests to determine the propriety of the use of an extraordinary remedy are as follows: Difficulties to the litigant and inconvenience to the courts, *In Re Simons*, 247 U. S. 231 (1918); hardship to the litigant and infringement of Congressional policy, *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196 (1945); and correction of an unwarranted assumption of judicial power, *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). Not just one, but all of these tests, are met by the instant case, so that here is truly an extraordinary case calling for an extraordinary remedy.

ARGUMENT.

I.

MANDAMUS IS AN APPROPRIATE REMEDY TO VACATE THE ORDER OF SEVERANCE AND TRANSFER AS AN UNAUTHORIZED REPUDIATION OF JURISDICTION.

Petitioner's position is that the respondent judge had no power to enter the order of severance and transfer because venue as to the defendant Cravey was properly laid in the Southern District of Florida. If, as we contend, venue was properly laid, it is clear from a reading of 28 USC § 1406(a), that the transfer power conferred is limited to and can be exercised in only those cases in which venue has been improperly laid. 28 USC § 1406(a) provides as follows:

> "The district court of a district in which is filed a case laying venue in *the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Italics supplied.)

28 USC § 1651(a) authorizes the Supreme Court and all courts established by Act of Congress, to issue all writs necessary or appropriate in aid of their respective jurisdictions. This revised section replaced § 262 of the old judicial code, and, according to the revisers' notes, is expressive of the construction placed upon the replaced section by this Court, in *United States Alkali Export Ass'n* v. *United States*, 325 U. S. 196 (1945), and *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). The revisers' notes were adopted as the House Committee Report (80th Congress, House Rpt. No. 308).

This Court, speaking of the former section, in *De Beers*

Consol. Mines v. United States, 325 U. S. 212 (1945), at 217, stated:

> "When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack."

The respondent judge and the defendant Cravey contend that the power to decide includes the power to decide wrongly, and that if the District Judge erred, such an error is not reviewable on a writ of mandamus. This position is identical with that of the dissenting Justices in the above quoted case which was rejected by Congress when it legislatively adopted the judicial construction placed upon § 262 by the majority in the *De Beers* case. It is obvious, therefore, that the Court of Appeals was empowered to issue the writ of mandamus if the respondent judge had exceeded his power and that any construction to the contrary is without merit.

In support of our contention that venue was properly laid as to the defendant Cravey, and, therefore, the order in question was beyond the power granted by § 1406(a), we respectfully direct this Court's attention to 15 USC § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides *or is found or has an agent* * * *." (Italics supplied.)

The order of severance and transfer was a result of the defendant Cravey's motion to dismiss, which was sup-

ported by an affidavit which contained no factual statement, but rather, the naked legal conclusions:

> "I do not now have, and never have had, an agent in the State of Florida; and that I have not been found and served with any summons or process within the Southern District of Florida." (R. 43.)[1]

Plaintiff filed affidavits in opposition to Cravey's motion (R. 62-77) which were not in any manner negated factually.[2] In addition to the allegations of the complaint charging and demonstrating the actual conspiracy,[3] petitioner's affidavits disclose additional specific overt acts committed in the Southern District of Florida by Cravey's co-conspirators Reserve Life Insurance Company, George Washington Life Insurance Company and J. Edwin Larson.

The affidavits likewise show that Cravey came into the District for the purpose, and with the intent of personally transacting and furthering the illegal business of the conspiracy, and while there, committed overt acts in conjunction with one or more of his co-conspirators; and that he knowingly and wilfully fostered and transacted the

---

1. Judge Holland found that the court had jurisdiction of the subject matter and person of Cravey. This finding is not here in issue.

Jurisdiction of subject matter is conferred by 28 U. S. C. § 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Jurisdiction of Cravey's person was acquired by the service of process on him in the Northern District of Florida pursuant to Rule 4(f), which provides: "All process * * * may be served anywhere within the territorial limits of the state in which the district court is held * * *."

2. Since the opposing affidavits were served in advance of the hearing, Cravey and his co-defendants had ample opportunity to controvert them in whole or in part. Not having done so, the assumption is that none of the facts could be truthfully denied.

3. R. 21-36.

illegal business of the conspiracy by causing the publication in a newspaper in the District, of the false statement that petitioner's licenses in Florida and Iowa had been revoked. Clippings of the false publication were used in the District by co-conspirators to damage and destroy petitioner's business. Accordingly, the respondent judge had only to apply the statutory tests as to whether Cravey had an agent or was found in the District. The facts are not in dispute. Cravey was a member of a conspiracy which was tantamount to being a member of a partnership; that partnership had as its business the illegal scheme of destroying the plaintiff's business and reaping the benefits therefrom. The partnership business was being conducted in the Southern District of Florida, and elsewhere.

In the case of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917), this Court enunciated the principle underlying the rule which makes proof of the acts and declarations of each conspirator admissible against the others. The Court said on pages 249-250:

> "* * * The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. * * *
>
> "Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. * * *"

This basic concept underlies the later decisions applying the substantive principle that a conspiracy is a partnership, and each conspirator is an agent of the other.

Thus in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), this Court said, at page 253:

> "* * * sales by any one of the respondents in the Midwestern area bound all. For a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all without any new agreement specifically directed to that act.'"

To like effect, in holding that a conspiracy is a partnership in criminal purpose, are the cases of *United States* v. *Kissel*, 218 U. S. 601 (1910), and *Pinkerton* v. *United States*, 328 U. S. 211 (1946).

In *United States* v. *Gooding*, 25 U. S. 460 (1827), Mr. Justice Story, speaking for the Court, said, at page 469:

> "Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. * * * So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all * * *."

Applying this substantive principle to the facts in the instant case, it is seen that Cravey, being a conspirator, was in partnership with three co-conspirators in the Southern District of Florida, and, therefore, had three agents in the District. One of these agents and co-conspirators is actually a resident of the Southern District of Florida; two other agents and co-conspirators of Cravey were licensed to do business in the State of Florida, were maintaining offices and transacting business in the District. All three of Cravey's agents and co-conspirators continued their activities in the District in furtherance of the conspiracy to destroy plaintiff's business up to and including the time suit was filed and service had upon Cravey.

In addition to having agents in the District, Cravey was "found" there through his co-conspirators residing and transacting the illegal business of the conspiracy in the District.

Closely analogous to the case at bar is *Giusti* v. *Pyrotechnic Industries* (C. A. 9 1946), 156 F 2d 351 (cert. den. *Triumph Explosives* v. *Giusti*, 329 U. S. 787, (1946)). In that case an association of fireworks manufacturing corporations called Triumph had at one time been licensed to do business in California. Having withdrawn prior to the commencement of the action, it had filed a certificate which provided that process against it in any action upon any liability incurred prior to its withdrawal might be served on the Secretary of State. The plaintiff sued Triumph and other companies, two of which were California corporations, charging a conspiracy to fix the price of fireworks in violation of the anti-trust laws. Process as to Triumph was served on the Secretary of State. The district court quashed this service and dismissed as to Triumph on the theory that the Secretary of State's agency was confined to suits upon liability created by Triumph only in business transacted in the state. It held that the activities of Triumph's California co-conspirators did not amount to transacting business so that Triumph did nothing in California although its co-conspirators destroyed plaintiff's business. The Court of Appeals reversed, holding that the continued acts of the co-conspirators in California to secure a monopoly was the transaction of business there by Triumph.

The rationale of the decision was stated with sparkling clarity at p. 354:

> "Prior to the enactment of antimonopoly acts by the federal and state Legislatures, it was a usual business transaction to combine to attempt to destroy a competitor and secure a monopoly in the field of the

business of the combining group. Such business activity is now made illegal by such legislation, but because it became a wrongful business activity it is none the less business transacted. The continuing acts of the conspirators extending over six months, is as much business as if by agreement in violation of the anti-trust acts all the conspirators had consistently underbid appellant and by that wrongful method destroyed his business by preventing him making any sales in California."

* * * * *

"The California members of the conspiracy were agents of Triumph in the conspiracy's attempt to destroy appellant's business. Triumph was in California acting through such agents, just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers."

In addition, the facts that Cravey had been physically present in the district, that he committed acts in furtherance of the conspiracy within the district, and that, subsequent to his departure, he caused overt acts to be committed in that district, meet the alternative requirement that he be "found" under the theory of constructive presence.

The doctrine that constructive presence within a given area results from acts of co-conspirators has long been recognized by this Court. An apt treatise on the subject is furnished by the case of *Hyde* v. *United States*, 225 U. S. 347 (1912). The question there presented was whether venue in conspiracy cases should be laid at the place where the conspiracy was formed or in a district where an overt act was committed. The defendants had not conspired in the District of Columbia, where venue was laid, in any sense other than by having caused overt acts to be committed there in furtherance of the conspiracy. In fact, the defendants had never left California. This Court said at pages 362, 363, 369:

"This court has recognized, therefore, that there may be a constructive presence in a state, distinct from a personal presence, by which a crime may be consummated.

"* * * We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals * * *."

Other statutes requiring "presence" have been comparably construed. In *O'Malley* v. *United States* (CA 8 1942), 128 F. 2d 676, the statute there invoked (former 28 U.S.C. § 385) provided punishment for contempt in the presence of the court or so near thereto as to obstruct the administration of justice. In that case, neither the acts committed at the conspirators' conference in Chicago, nor those committed in a hotel in Kansas City, were in the geographical presence of the court. The Circuit Court of Appeals held not only that the conspirators were partners and each was agent of the others, but also that their constructive presence in court through their agents, subjected them to punishment for the acts committed by the agents.

This Court, in reversing on other grounds (317 U. S. 412, 416-417) stated:

"For, although we assume arguendo that the Circuit Court of Appeals was correct in holding * * * that the conduct of petitioners was 'misbehavior' in the 'presence' of the court within the meaning of section 268 of the judicial code, and therefore punishable as a contempt, we are of the opinion that this prosecution was barred by section 1044 of the revised statutes."

The dissenting Justices agreed that the conduct in question was within the "presence" of the Court, and, hence, a contempt within the meaning of the statute.

In *Ferguson* v. *Ford Motor Co.*, (D. C. N. Y.) 77 F. Supp. 425 (1948), approved by mandamus, *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (cert. den. 340 U. S. 851), it was held,

because conspiracy was alleged, that for the purpose of laying venue in New York against Henry Ford II, a resident of Michigan, patent infringements in New York were his acts there, and the company's regular and established place of business in New York was his regular and established place of business. The statute there involved provided that the venue of patent infringement actions should be the district of which the defendant is an inhabitant, or any district in which the defendant "shall have committed acts of infringement and have a regular and established place of business." (28 U. S. C. § 109.) The conclusion of the Court, as stated at page 436, was:

> "* * * as an alleged member of the claimed conspiracy he is liable, once the conspiracy has been established, for the acts of the other alleged conspirators committed to accomplish its alleged aims and purposes. * * * He must, therefore, for this motion to be considered to have committed the acts of infringement alleged within this district. * * *"

The Court also refused to permit him to escape the consequences of his co-conspirator's having a regular and established place of business in New York. It said at page 436:

> "The Ford Motor Company does not deny that it has been qualified to do business in New York since 1920, and that it has a regular place of business at 45 Rockefeller Plaza, New York City. * * * Henry Ford II must be considered, in effect, the Ford Motor Company for this purpose."

As was held in *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 454 (1948), "found" in the venue sense does not necessarily mean physical presence, and, as there indicated, it is not important that when process was served on Cravey he had left the Southern District of Florida.

It is indisputable that mandamus lies against any offi-

cer, executive, judicial, or non-judicial who acts beyond his legal powers. *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249 (1908).[4]

Accordingly, since the respondent judge had before him a case in which the court admittedly had jurisdiction and venue was proper, he was not empowered by any statute, much less § 1406 (a), to renounce that jurisdiction.

II.

MANDAMUS IS AN APPROPRIATE REMEDY TO VACATE AN ORDER WHICH WOULD RESULT IN NEEDLESS DUPLICATION OF TRIALS AND APPEALS TO ENFORCE THE RIGHT TO A SUBSEQUENT SINGLE TRIAL AGAINST ALL DEFENDANTS IN THE PROPER FORUM.

The Court of Appeals granted plaintiff leave to file the petition for mandamus. (R. 110.) The petition summarized the uncontroverted facts in the complaint and opposing affidavits and also alleged the following undenied facts: The conspiracy action will involve the testimony of more than 100 witnesses residing in more than 31 states, the taking of whose depositions and testimony, if they must be duplicated in consequence of the order of severance and transfer, would impose an extraordinary burden on the two district courts, as well as on the litigants. The order, if permitted to stand, would defeat the objective of trying related issues in a single action. The resultant multiplicity of actions would give rise to a myriad of legal and practical problems in the progress of one action sectionally in two courts, such, for instance, as priority of trials, possible conflicting rulings by two courts on identical matters, precedence between the two courts in the production of original documents and other evidence, possible conflicting verdicts of two juries on identical issues, possible differen-

4. See also, *In re United States*, 263 U. S. 389 (1923); cf. *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929).

ces in amounts of verdicts of two juries on identical evidence of damage, and the effect of the verdict first rendered upon the trial of the other section of the same action. (R. 2-12.)

Mandamus is an extraordinary legal remedy although in the main controlled by equitable principles.[5] The major consideration in determining its appropriate use is the absence of any other adequate remedy. Petitioner has no other adequate remedy as there can be no appeal at this stage of the proceedings,[6] and the order, unless dealt with now, will result in irreparable damage and delay as the consequence of a judicial act.

The ordinary remedy of appeal after judgment would be wholly inadequate. This is so because the splitting of the action into two sections in different districts would result in two appealable judgments rather than the usual one. The reversal of either would not suffice to enforce petitioner's right to a single trial against all defendants in a proper forum. The right could be enforced only by the reversal of both judgments.

It is believed that never before has there been an order so extraordinary that unless vacated by mandamus appeals from two judgments would be required for its reversal. To deny relief pending one trial, one judgment and one appeal would be bad enough, but it would be unconscionable to say that petitioner could have no relief pending two trials, two judgments and two appeals, all for the single purpose of reversing one order.

It is apparent that if the Florida section of the action should go to judgment first and the order of severance and transfer should be reversed on appeal, there would arise

5. Willis Constitutional Law of the United States (1936), pp. 92-93, citing *Marbury* v. *Madison*, 5 U. S. 137 (1803), *United States* v. *Allen*, 192 U. S. 543 (1904).

6. 28 U. S. C. §§ 1291-1292.

immediately the question whether defendant Cravey was a party to the appeal and whether the reversal was binding on him or on the District Court in the Georgia section of the action. It also is apparent that if, during the pendency of such appeal, the Georgia section of the action should go to judgment, the latter would become final and binding unless also appealed.

These illustrations are but suggestive of the countless possible and probable extraordinary procedural difficulties, complications and hardships which almost inevitably would require appeals from and reversals of both judgments before petitioner could enforce its right to a single trial against all defendants in a proper forum.

It is extremely doubtful that plaintiff would be able to demonstrate to the Court of Appeals in either section of the case that the severance order had resulted in a different verdict in either section.

Another detriment to the administration of impartial justice apparent from the order is that the judge and jury in the trial in the Southern District of Florida will, in all probability, be denied the opportunity of observing the manner and demeanor of Cravey as a witness and the judge and jury in the trial in the Northern District of Georgia undoubtedly will be denied the opportunity of observing the manner and demeanor, as witnesses, of the defendant Larson and of the officers and employees of the corporate defendants.

Assuming *arguendo* that some relief might be accorded plaintiff by either subsequent appeal or retransfer from the Northern District of Georgia to the Southern District of Florida, the proceedings had during the interim in either section of the case would not be binding on the parties in the other section. This would be particularly true as to depositions, both for discovery and for preservation of tes-

timony, some of which were in progress in Miami when the order was entered.

The order will present many practical problems and impose great expense on plaintiff. Imagine, if you will, the duplication in filing proofs of service of notices to take depositions in more than 31 districts as predicates for the issuance of subpoenas and subpoenas *duces tecum* pursuant to Rule 45 (d) (1), only to have the judge in the Georgia section of the action enter orders pursuant to Rule 30 (b) that a deposition be not taken, or that it be taken at some other place, or that certain matters shall not be inquired into, or that the scope of the examination be limited, or that no one shall be present except the parties or their counsel, while at the same time, the Judge in the Florida section may be entering orders regulating the identical matters. It is even possible that the two trial judges might reach different results in such orders. This is but one illustration of the chaos likely to result if the remedy of mandamus is withheld.

It is extremely doubtful that the additional expense thus imposed on plaintiff could be recovered, since such damages would be the consequence of a judicial act.[7] We respectfully submit that both the statute and the cases preclude such an extraordinary course of litigation.[8]

We have here no ordinary case of hardship resulting from an interlocutory order denying a plea in bar, or some preliminary motion which might end the litigation, nor do we have the ordinary case of hardship wherein parties are

7. See footnote 2, *Ford Motor Co.* v. *Ryan* (C.A. 2 1950), 182 F. 2d 329, at 330.

8. "To require plaintiffs to sue Sherman here and the other defendants in Detroit would be the nadir of convenient administration." *Ferguson* v. *Ford Motor Co.*, (D. C. N. Y.) 77 F. Supp. 425, 433 (1948), approved in the mandamus proceeding of *Ford Motor Co.* v. *Ryan* (C. A. 2 1950), 182 F. 2d 329 (cert den. 340 U. S. 851).

compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. Mandamus is the only adequate remedy to restrict the unfounded assumption of power inherent in this order before two trials and two appeals have been completed.

III.

THE LACK OF POWER TO ENTER THE ORDER AND ITS EXTRAORDINARY CONSEQUENCES GO FAR BEYOND THE FORMULAE UPON WHICH THIS COURT HAS HERETOFORE GRANTED EXTRAORDINARY RELIEF.

Decisions of this Court have announced the principles under which the extraordinary writs authorized by 28 U. S. C. § 1651(a) may be used to vacate orders prior to final judgment. The case of *In re Simons*, 247 U. S. 231, 239-240 (1918), illustrates an action calling for use of the remedy of mandamus. There, Mr. Justice Holmes, speaking for a unanimous court, said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to proceed * * *."

The principle suggested by this case, thus, has two requisites, first: the difficulty or hardship imposed upon the plaintiff; and, secondly: the inconvenience to the courts. Both of these requirements are amply met in the instant case, as is shown under Section II above.

A second test is suggested by another opinion of this Court. In *United States Alkali Export Ass'n. v. United States*, 325 U. S. 196, at 204 (1945), the considerations calling for resort to the extraordinary remedies were: "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, * * *."

Of petitioner's hardships we have already spoken. A second consideration, that is, "infringement of the asserted Congressional policy" also has its parallel here. The order, if permitted to stand, is clearly a contravention of the Congressional policy articulated in 15 U. S. C. § 15. This policy gives plaintiff the statutory right to sue all of the parties named as defendants, in the Southern District of Florida. Since Judge Holland's order is in conflict with this policy, and since the hardships of plaintiff are undeniable, the doctrine of the *United States Alkali* case dictates the propriety of the use of the extraordinary remedy herein sought.

The last test suggested by the opinions of this Court is found in *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212 (1945), to which reference has already been made in Section I. Under the doctrine of that case, the sole consideration is the existence or non-existence of judicial power to do that which it purports to do. 28 U. S. C. § 1406(a), by its terms, empowers judicial action only when venue has been laid in the wrong division or district. Since venue is correctly laid, Judge Holland had no power to enter the order of transfer under this section.

In view of these authorities, petitioner has a truly extraordinary case, calling for an extraordinary remedy. The exacting tests of the authorities cited have apparently never before been fulfilled by a single case. Taken singly, the

cited cases such present a determining test finding its analogy in the instant case. Taken cumulatively, the cited cases dictate the conclusion that here is an extraordinary case fully meriting an extraordinary remedy under § 1651 (a).

CONCLUSION.

For the reasons heretofore assigned and argued, we respectfully request this Court to direct the Court of Appeals for the Fifth Circuit to revise and correct its order of dismissal, and to issue the writ of mandamus directed to the respondent judge commanding him to vacate and set aside the order of severance and transfer as to defendant Cravey.

All of which is respectfully submitted.

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